87-245

No.

Supreme Court, U.S.
FILED
AUG 12 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

OTIS T. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

JEANNE A. JORDAN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

ALBERT G. LAUBER, JR.
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

CHRISTINE R. WHITTAKER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

Under the Social Security Act, the Secretary of Health and Human Services may provide that benefits due a beneficiary who is a minor child or an incapacitated adult may be paid on his behalf to a relative or other person (a "representative payee"). In this nationwide class action challenging the constitutionality of procedures used by the Secretary in making such payments, the district court granted nationwide injunctive relief ordering the Secretary, on due process grounds, to establish certain accounting procedures, including a requirement that all representative payees file an annual accounting with the Secretary. While the Secretary's appeal from that order was pending, Congress addressed the issue in this case and established a general annual accounting requirement, while exempting certain representative payees from that requirement. Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, § 16, 98 Stat. 1809-1811, 42 U.S.C. (Supp. III) 405(j), 1383(a)(2). Two questions are presented.

1. Whether the court of appeals properly dismissed the Secretary's appeal on the ground that the Secretary had abandoned his challenge to the district court's order, where the Secretary argued on appeal that the order should be reversed because the intervening Act of Congress establishing new accounting requirements was constitutional and controlling.

2. Whether Congress's 1984 exemption of certain representative payees from the annual accounting requirement is constitutional.

PARTIES TO THE PROCEEDINGS

The named respondent, Jeanne A. Jordan, is the representative of a nationwide class of all recipients of benefits under Title II or Title XVI of the Social Security Act whose benefits are or have been paid to a representative payee at any time on or after the filing of this action (App. 21a). Appellee Barbara Leeds was permitted to intervene as a plaintiff (App. 24a).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutory provisions involved	3
Statement	4
Reasons for granting the petition	10
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Aune v. *Reynders*, 344 F.2d 835 (10th Cir. 1965)	9, 14
Blodgett v. *Holden*, 275 U.S. 142 (1927)	13
Bradley v. *Richmond School Board*, 416 U.S. 696 (1974)	8, 12
Rostker v. *Goldberg*, 453 U.S. 57 (1981)	13
Schweiker v. *McClure*, 456 U.S. 188 (1982)	15
United States v. *Locke*, 471 U.S. 84 (1985)	3
Vance v. *Bradley*, 440 U.S. 93 (1979)	15
Walters v. *National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985)	13, 15

Constitution, statutes and rule:

U.S. Const. Amend. V (Due Process Clause)	4
Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794	*passim*
§ 16, 98 Stat. 1809-1811	2
§ 16(d), 98 Stat. 1811	12
Social Security Act, 42 U.S.C. (& Supp. III) 301 *et seq.*:	
§ 205(j), 42 U.S.C. (Supp. III) 405(j)	3
§ 205(j)(1), 42 U.S.C. (Supp. III) 405(j)(1)	4
§ 205(j)(3)(A), 42 U.S.C. (Supp. III) 405(j)(3)(A)	5

Statutes and rule—Continued: Page

§ 205(j)(3)(B), 42 U.S.C. (Supp. III) 405 (j)(3)(B) 6
§ 205(j)(3)(C), 42 U.S.C. (Supp. III) 405 (j)(3)(C) 6
§ 205(j)(3)(D), 42 U.S.C. (Supp. III) 405 (j)(3)(D) 6
§ 1631(a)(2), 42 U.S.C. (Supp. III) 1383 (a)(2) 3
§ 1631(a)(2)(A), 42 U.S.C. (Supp. III) 1383 (a)(2)(A) 4
§ 1631(a)(2)(C)(i), 42 U.S.C. (Supp. III) 1383(a)(2)(C)(i) 5
§ 1631(a)(2)(C)(ii), 42 U.S.C. (Supp. III) 1383(a)(2)(C)(ii) 6
§ 1631(a)(2)(C)(iii), 42 U.S.C. (Supp. III) 1383(a)(2)(C)(iii) 6
§ 1631(a)(2)(C)(iv), 42 U.S.C. (Supp. III) 1383(a)(2)(C)(iv) 6
28 U.S.C. 1252 ..... 1, 2, 3
Fed. R. Civ. P. 60(b) 6, 7, 14, 15

Miscellaneous:

7 J. Moore & J. Lucas, *Moore's Federal Practice* (2d ed. 1985) 14, 15
S. Rep. 98-466, 98th Cong., 2d Sess. (1984) 6

In the Supreme Court of the United States

OCTOBER TERM, 1987

No.

OTIS T. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

JEANNE A. JORDAN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Health and Human Services, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals dismissing the Secretary's appeal (App. 56a-62a [1]) is unreported.

[1] "App." refers to the separately-bound consolidated appendix to this petition for a writ of certiorari and to the jurisdictional statement in *Bowen* v. *Jordan*, No. 87——, in which we have taken a direct appeal to this Court under 28 U.S.C. 1252 from a related order of the district court.

The March 26, 1984, order of the district court that was the subject of that appeal (App. 41a-43a) is unreported. The other orders of the district court (App. 1a-5a, 8a-22a, 23a-40a, 44a-47a, 48a-55a) are also unreported.

JURISDICTION

The order of the court of appeals dismissing the Secretary's appeal was entered on January 5, 1987 (App. 56a), and the Secretary's petition for rehearing was denied on June 19, 1987 (App. 73a-74a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

In addition to filing this petition for a writ of certiorari, the Secretary has taken a direct appeal to this Court under the first paragraph of 28 U.S.C. 1252 from the April 10, 1987, order of the district court in this same case.[2] The notice of appeal to this Court from the district court's April 10, 1987, order was filed on May 8, 1987 (App. 6a-7a), and the jurisdictional statement was filed on August 6, 1987. *Bowen* v. *Jordan*, No. 87- .

Under the second paragraph of 28 U.S.C. 1252, once a notice of direct appeal to this Court has been filed, "[a]ll appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court." This provision brings

---

[2] In the April 10, 1987, order (App. 1a-5a), the district court denied the Secretary's motion for relief from the same order, dated March 26, 1984 (App. 41a-43a), that was before the Tenth Circuit here. In denying the motion, the district court held unconstitutional certain provisions of Section 16 of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1809-1811, which was enacted after the district court entered its March 26, 1984, order.

"the entire case" to this Court so that constitutional issues may be avoided if possible. *United States* v. *Locke*, 471 U.S. 84, 92 (1985). The Secretary's appeal to the Tenth Circuit, at issue in the instant certiorari petition, was taken prior to the filing of the notice of direct appeal to this Court on May 8, 1987, and that appeal was still pending in the court of appeals, on the Secretary's petition for rehearing, when the notice of direct appeal was filed. It may be, therefore, that under the second paragraph of 28 U.S.C. 1252 the Secretary's appeal to the Tenth Circuit should "be treated as having been taken to the Supreme Court" and that the proceedings in the Tenth Circuit should be deemed to have been transferred to this Court as of the filing of the notice of direct appeal on May 8, 1987.

If this view of 28 U.S.C. 1252 is correct, the issues raised in this certiorari petition are already before this Court by virtue of the transfer of proceedings by operation of law under the second paragraph of 28 U.S.C. 1252. For the same reason, the Tenth Circuit would have been without jurisdiction after May 8, 1987, to act on the Secretary's pending rehearing petition, so that the June 19, 1987, order denying that rehearing petition (App. 73a-74a) would be void. The instant proceedings would presumably be treated as pending before *this Court* on the Secretary's petition for rehearing. If so, then this petition for a writ of certiorari is unnecessary.

STATUTORY PROVISIONS INVOLVED

Sections 205(j) and 1631(a)(2) of the Social Security Act, as codified at 42 U.S.C. (Supp. III) 405(j) and 1383(a)(2), are reproduced at App. 76a-80a.

STATEMENT

As we have explained, under the heading "Jurisdiction" (pages 2-3, *supra*), this petition for a writ of certiorari is related to a direct appeal that the Secretary has taken to this Court from an order of the United States District Court for the Western District of Oklahoma. *Bowen* v. *Jordan*, No. 87- . In the jurisdictional statement filed on that appeal (at 2-15), we have thoroughly explained the statutory and regulatory framework and the proceedings in this case, both in district court and in the court of appeals. Rather than repeating that discussion here, we shall summarize those proceedings only insofar as they are directly relevant to this petition.

1. This is a nationwide class action that was filed in the United States District Court for the Western District of Oklahoma in 1979 to challenge certain procedures used by the Secretary of Health and Human Services when he determines that a particular beneficiary's Social Security benefits should be paid to a "representative payee" on behalf of the beneficiary. Such an arrangement is used where the beneficiary is a minor child or is an adult who has a mental or physical condition that prevents him from adequately managing his own affairs. The authority for the Secretary to pay benefits to a representative payee is conferred by Sections 205(j)(1) and 1631(a)(2)(A) of the Social Security Act, 42 U.S.C. (Supp. III) 405(j)(1) and 1383(a)(2)(A).

In an order entered on March 17, 1983 (App. 23a-40a), the district court held that individuals whose Social Security benefits are paid to a representative payee have a right under the Due Process Clause of the Fifth Amendment to have the payee submit to the

Secretary a periodic accounting of his expenditure of those benefits (App. 34a-37a). The district court therefore directed the Secretary "to implement appropriate mandatory periodic accounting procedures within one year from the date of this Order" (App. 37a). The Social Security Administration (SSA) responded by formulating a plan under which all representative payees would be notified that they must maintain records regarding the use of payments, but an actual report would be required of only a random sample of 10% of the representative payees each year (App. 42a, 58a). In a brief order dated March 26, 1984, the district court (i) found that the Secretary's proposal was inadequate and (ii) ordered the Secretary to require accounting by all representative payees on an annual basis (App. 41a-43a).[3]

2. The Secretary filed a notice of appeal from the district court's March 24, 1984, order. Before that appeal was briefed and argued, Congress enacted the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794. In Section 16 of that Act, Congress generally directed the Secretary to require representative payees to report at least annually on the use of the benefit payments they received; Congress also required the Secretary to review a sample of those reports in order to identify instances of possible misuse. See 42 U.S.C. (Supp. III) 405(j)(3)(A), 1383(a)(2)(C)(i). Congress expressly *excluded* from this annual accounting requirement, however, those representative payees who are the parent or spouse of the beneficiary and live in

---

[3] On July 2, 1984, the district court granted the Secretary's motion to amend the March 26, 1984, order to exclude from the annual accounting requirement any federal and state facilities for the mentally ill or retarded that serve as representative payees (App. 44a-47a).

the same household as the beneficiary. 42 U.S.C. (Supp. III) 405(j)(3)(B), 1383(a)(2)(C)(ii).[4] The legislative history of the 1984 Act demonstrates that Congress enacted this exemption specifically because it disagreed with the district court's March 26, 1984, order in this case. See J.S. 9-10. Congress determined that "it is neither necessary nor appropriate to require governmental supervision or detailed accounting in the case of close familial relationships (parent and child or spouses living together) absent some allegation or overt reason to suspect the possibility of misuse of funds." S. Rep. 98-466, 98th Cong., 2d Sess. 29 (1984).

3. After the 1984 Act was passed, the Secretary filed a motion with the district court for an "indicative ruling" and for relief from judgment under Fed. R. Civ. P. 60(b). The Secretary contended that the new statutory procedures afforded a constitutionally adequate system of monitoring, so that the universal accounting requirement imposed by the district court's order should be set aside. The court ruled on that motion on January 18, 1985 (App. 48a-55a).

The district court first held that, because the case was then pending on appeal to the Tenth Circuit, it was "without jurisdiction to rule on a motion for relief from judgment pursuant to Rule 60(b)" (App. 48a; see also *id.* at 51a, 55a). The court nevertheless

---

[4] For those payees, the Secretary must require the parent or spouse to verify on a periodic basis that he continues to live in the same household as the beneficiary. 42 U.S.C. (Supp. III) 405(j)(3)(B), 1383(a)(2)(C)(ii).

The 1984 Act also exempts federal and state institutions serving as payees from the annual accounting requirement. 42 U.S.C. (Supp. III) 405(j)(3)(C) and (D), 1383(a)(2)(C)(iii) and (iv).

went on to state that it would "grant defendant's motion for an indicative ruling and advise the parties that were such a motion [for relief from judgment under Rule 60(b)] presented, it would be denied" (App. 48a). The court explained that it still was of the view that the Due Process Clause requires periodic annual accounting by *all* representative payees, notwithstanding Congress's contrary judgment (*id.* at 54a); therefore, the court concluded, "it could not grant a Rule 60(b) motion were such motion presented" (*id.* at 55a).

Because the district court stated that it did not have jurisdiction to rule on a motion for relief from judgment under Rule 60(b), and therefore proceeded as if a Rule 60(b) motion had not actually been presented, the Secretary did not take an appeal from the January 18, 1985, order insofar as it purported to give only an "indicative ruling."

4. The Secretary did seek to have the Tenth Circuit address the constitutionality of the 1984 Act in its consideration of the appeal that was still pending before the Tenth Circuit, which, in fact, had not yet been briefed. In the March 26, 1984, order that was the subject of that appeal, the district court had (i) rejected the Secretary's proposal for reporting by a 10% sample of beneficiaries and (ii) ordered the Secretary to require annual reporting by all representative payees (App. 42a-43a). The Secretary did not raise the first issue on appeal, because the proposal for accounting by 10% of representative payees was inconsistent with the superseding requirement under the 1984 Act that all representative payees make an annual accounting, subject to the specified exceptions. The Secretary did challenge the second aspect of the district court's ruling, arguing that the court of ap-

peals was required to apply the intervening change in the law and to exclude from mandatory annual accounting the representative payees who were excluded by the 1984 Act—parents and spouses living with the beneficiary and state and federal institutions in which the beneficiary resides. See Sec'y C.A. Br. 17, citing, inter alia, *Bradley* v. *Richmond School Board*, 416 U.S. 696, 714 (1974). The Secretary accordingly informed the court (C.A. Br. 14): "Since there is now a statutorily-required accounting program, * * * the only issue on appeal now is whether Congress's decision to exempt certain payees from the accounting program satisfies the requirements of due process." The remainder of the Secretary's brief was devoted to a defense of the constitutionality of Congress's exemption from the annual accounting requirement of parents and spouses living with the beneficiary (C.A. Br. 17-28).

On January 5, 1987, the court of appeals dismissed the Secretary's appeal (App. 56a-62a). Although the March 26, 1984, district court order that was the subject of that appeal required annual accounting by *all* representative payees, and although the Secretary's argument on appeal defended the intervening Act of Congress that provided for annual accounting by *fewer than all* payees, the court of appeals concluded that the Secretary had "abandoned any challenge to the order from which the appeal is taken" (*id.* at 61a). The court apparently believed that the Secretary could challenge that order only by arguing that the 10%-sample plan he originally proposed was consistent with due process, even though that proposal had since been superseded by the 1984 Act (*id.* at 60a-61a).

The court of appeals also reasoned that the constitutionality of the 1984 Act could not properly be considered because the Secretary had declined to take an appeal from the district court's January 18, 1985, order (App. 61a-62a). Although the district court had stated in that order that it was only granting an "indicative ruling" and that it was "without jurisdiction to rule on a motion for relief from judgment" (App. 48a), the court of appeals held that, under its prior decision in *Aune* v. *Reynders*, 344 F.2d 835 (10th Cir. 1965), the district court in fact did have jurisdiction to deny a motion for relief from judgment while an appeal was pending (App. 61a-62a). The court of appeals acknowledged that the language of the district court's January 18, 1985, order was ambiguous and did not "comport precisely" with the pertinent ruling of *Aune* (App. 61a-62a). The court believed, however, that the district court's order had the "effect" of denying the Secretary any relief from judgment. Because the Secretary had not appealed the January 18, 1985, order, the court of appeals declined to pass on that order (*id.* at 62a).

5. The Secretary filed a timely petition for rehearing of the court of appeals' dismissal of the appeal. In addition, since the court of appeals had made clear that the district court *would* have jurisdiction to deny a motion for relief from judgment, even while the Secretary's appeal was still pending in the court of appeals, the Secretary filed a new motion for relief from the district court's March 26, 1984, order that imposed an annual accounting requirement on all representative payees. In that way, the Secretary sought to ensure the availability of some avenue for appellate consideration of the important question of the constitutionality of the 1984 Act—if not in the

Tenth Circuit, then in a direct appeal to this Court from a district court order denying the motion for relief from judgment. By order dated April 10, 1987, the district court denied the Secretary's motion for relief from judgment. That order is the subject of the direct appeal that was docketed in this Court on August 6, 1987.

The court of appeals denied the Secretary's petition for rehearing on June 19, 1987 (App. 73a-74a).

REASONS FOR GRANTING THE PETITION

The court of appeals' order dismissing the Secretary's appeal in this case is inexplicable. The court of appeals left in place a nationwide injunction that effectively nullifies the 1984 Act, without considering the constitutionality of that Act. The 1984 Act was passed with specific reference to this case. The Secretary vigorously defended the 1984 Act's exclusions before the court of appeals, and the validity of those exclusions was properly before the court.

We have explained in our jurisdictional statement on the direct appeal (at 15-23) that the exclusions from mandatory annual accounting under the 1984 Act are constitutional. We will not repeat that discussion, which we incorporate by reference here. We have also explained (J.S. 23) the importance of the issue whether an annual accounting requirement may be judicially imposed on the representative payees for more than three million beneficiaries for whom Congress, in a decision made with specific reference to this case, found that an accounting would be both unnecessary and inappropriate. This petition is filed to ensure that the issue will not remain unaddressed. If the Court does not decide the constitutional question on the Secretary's direct appeal, it should vacate

the judgment of the court of appeals and remand with directions to consider the constitutionality of of the 1984 Act.

1. Contrary to the court of appeals' assertion, the Secretary manifestly had not "abandoned any challenge to the [March 26, 1984] order from which the appeal [was] taken" (App. 61a). In that order, the district court had required *universal* annual accounting by all representative payees. In his brief on appeal, the Secretary argued that the order could not stand because the system of *less-than-universal* accounting mandated by the 1984 Act was valid and controlling. The Secretary therefore asserted that the March 26, 1984, order should be set aside. The conclusion to the Secretary's brief in fact states the point explicitly (C.A. Br. 28 (emphasis added)): "For the foregoing reasons, *the decision of the district court should be reversed* and the statutory scheme held controlling."

The Secretary cannot be held to have "abandoned" the appeal on the ground that he did not renew on appeal his argument in district court that a 10%-sample approach should be approved. First, the district court's refusal to adopt the 10%-sample approach was only one issue that might have been presented on appeal; the other, and more basic, issue was whether the district court's requirement of universal accounting was proper. Although the Secretary did not press the first issue after the 1984 Act was enacted, the Secretary, as we have just explained, continued to argue that the district court's requirement of universal accounting was erroneous. Moreover, Congress had rejected the 10% solution in the 1984 Act and had thereby foreclosed the Secretary, if the Act is constitutional, from urging it on

appeal. The 1984 Act thus made defense of the sampling approach unavailable on appeal. Neither the Act nor anything else, however, led the Secretary to abandon his challenge to the district court's universal accounting requirement.

In fact, the 1984 Act, by creating a conflict between the district court order and an express congressional judgment made with specific reference to this case, only heightened the importance of appellate consideration of the validity of the district court order. The question of the Act's constitutionality was squarely presented to the court of appeals, because, if the Act was constitutional, then the district court injunction could not stand.[5] Under *Bradley* v. *Richmond School Board*, *supra*, on which the Secretary relied in his brief on appeal, the court of appeals was obligated to take into account the intervening change in the law, and either to decide the constitutionality of the Act or to vacate the district court's March 26, 1984, order and remand to that court with instructions to consider the constitutional question.

More than the *Bradley* obligation was at stake in this case. The district court had entered a nationwide order, apparently permanent in nature, that bound

---

[5] Section 16(d) of the 1984 Act specifically provided that "[t]he amendments made by this section"—which included both the mandatory annual accounting requirement and the exemptions from that requirement for co-resident parents and spouses and for institutions—"*shall become effective on the date of the enactment of this Act*" (98 Stat. 1811 (emphasis added)). Congress, whose intention with respect to the application of the provisions it enacted is controlling, thus unambiguously required the court of appeals to consider the superseding statutory accounting provisions with respect to any claim to an accounting after October 9, 1984, the effective date of the Act (*ibid.*).

the Secretary on a prospective basis. The court of appeals' failure to apply the change in the law wrought by the 1984 Act therefore had the effect of nullifying the Act without any consideration of its validity. "Judging the constitutionality of an Act of Congress is properly considered ' "the gravest and most delicate duty that this Court is called upon to perform," ' " and the "duly enacted and carefully considered decision of a coequal and representative branch of our Government" is entitled to respect. *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985) (quoting *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981), and *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.)). Both Congress and the Secretary were entitled to have the 1984 Act's validity given the full consideration that the court's "delicate duty" required when the constitutionality of an Act of Congress is at stake.

2. Contrary to the court of appeals' suggestion (App. 61a-62a), the Secretary's failure to appeal the district court's January 18, 1985, order in no way diminished the appellate court's obligation to consider the Secretary's argument that the 1984 Act was constitutional and required reversal of the district court's March 26, 1984, order. First, as we have explained, the validity of the 1984 Act and of the district court order was squarely and properly presented to the court of appeals in its consideration of the appeal that was already pending before it. The Secretary asserted that the March 26, 1984, order should be reversed; and because of the intervening change in the law, it became necessary for the court of appeals, in ruling on that contention, to address the constitutionality of the 1984 Act or to remand the case for the district court to address that issue.

That obligation is not dissolved or in any way reduced by the availability of an alternative means of raising the same question. Thus, even if the constitutional question could have been raised on appeal from the January 1985 district court order, the fact remains that the court of appeals was already required to consider the issue on appeal from the March 26, 1984, order.

Second, the Secretary committed no procedural default in failing to appeal from the January 18, 1985, ruling. The district court held (even if erroneously under *Aune* v. *Reynders*, *supra* [6]) that it did not have jurisdiction to deny or to entertain, let alone to grant, a Rule 60(b) motion by the Secretary; the court merely indicated how it would rule if presented with such a motion (App. 48a, 51a, 55a). Thus, the January 1985 order was not a ruling on the merits of the Secretary's defense of the controlling effect and constitutionality of the 1984 Act. The Secretary's failure to appeal from the order, therefore, cannot constitute an abandonment of any challenge to such a ruling. Although the district court may have erred in believing it lacked jurisdiction, the Secretary could and did reasonably take the order at face value, as merely a jurisdictional ruling that did not warrant an appeal.

---

[6] The law in the Tenth Circuit has been somewhat less clear than the court of appeals' opinion suggests. Compare 7 J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 60.30[2], at 60-333 (1985) (citing Tenth Circuit as among circuits that have required appellate permission for a district court even to entertain a Rule 60(b) motion while the case is on appeal), with *id.* at 60-335, 60-336 & n.19 (citing *Aune* as a decision allowing district court denial of a Rule 60(b) motion while the case is on appeal).

3. In any event, the court of appeals' ruling concerning procedural rules governing Rule 60(b) motions provided no basis for its conclusion that the Secretary had abandoned his challenge or for its refusal to consider the merits. In this setting, "a litigant, who in good faith initiates a timely procedure for relief, should not be penalized for choice of the 'wrong' procedure" (7 J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 60.30[2], at 60-338 (2d ed. 1985)). This is especially so where the validity of an Act of Congress is at issue. Congress made a deliberate decision contrary to the district court's injunction; yet the court of appeals left that injunction in place, thus effectively nullifying an Act of Congress, without considering the validity of the Act. The burden is on those who attack the constitutionality of an Act of Congress and the factual assumptions on which it is based (*Vance* v. *Bradley*, 440 U.S. 93, 109-112 (1979)), and courts must show deference to Congress's good faith judgments regarding the adequacy of procedural protections. See, *e.g.*, *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. at 319-320; *Schweiker* v. *McClure*, 456 U.S. 188, 200 (1982). The court of appeals, in refusing to review the district court injunction, abandoned those principles all the more completely than if it had erred, for example, in allocating the burden of proof.

4. Although the court of appeals dismissed the Secretary's appeal on essentially procedural grounds, the effect of the dismissal is such as to raise issues warranting this Court's review. For the reasons we set forth in our jurisdictional statement in No. 87- —, the underlying question of the constitutionality of the 1984 Act plainly merits this Court's consideration.

We suggest that that may best be assured by granting this petition and consolidating the case for briefing and argument with the related appeal.

CONCLUSION

The petition should be granted and the case consolidated with the appeal in No. 87- —.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

ALBERT G. LAUBER, JR.
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

CHRISTINE R. WHITTAKER
Attorney

AUGUST 1987

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181483 40426